and as such cannot hold a tenancy. This characteristic is peculiar to the common law concept of an unincorporated entity and has caused difficultities in the past. Some of these difficulties mainly those of a procedural nature have been met by rules of court. The Rules of the High Court, 1980 (Order 77) provide for the commencement of legal proceedings by and against partnership firms in the firm name which is merely a convenient method of encapsulating the individual partners who constitute the partnership firm. The firm name is not in itself the name of any person other than the partners because in the wods of Farewell L.J. in *Sadler* v. *Whiteman*[5]:

"The fallacy is to say that a partner in a firm does not, but the firm does, carry on business. In English law a firm as such has no existence; partners carry on business both as principals and as agents for each other within the scope of the partnership business; the firm name is a mere expression; the firm name is a mere expression, not a legal entity, although for convenience under Order XLVIII. A it may be used for the sake of suing and being sued."

A plaintiff who sues such partners in their firm name sues them individually just as much as if he had set out all their names. Lindley L.J. said of this in *Western National Bank of City of New York* v. *Perez, Triana & Co.*:

"When a firm's name is used, it is only a convenient method for denoting those persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm in truth sues them individually, just as much as if he had set out all their names."

A fortiori when a plaintiff serves a notice to quit on the individual partners in their firm name, he serves them individually just as much as if he had set out all their names. We find further support of this view in the following passage from the speech of Lord Diplock in the recent Privy Council case of *Eng Chuan & Co. & Ors.* v. *Four Seas Communications Bank Ltd.*[7]

"The notice to quit dated January 29, 1976, addressed by solicitors on behalf of the Bank to "Eng Chuan & Co." acknowledge the existence of a tenancy in the person or persons to whom what description properly applies, since it requires them to "quit and deliver up" possession of the Premises "on February 29, 1976 (or at the expiration of the month of your tenancy which will expire next after the end of one calendar month from the time of the service of this Notice)". The only persons to whom that description properly applied, and had done so ever since December 31, 1953, were the three personal appellants whose names had appeared in the Register of Business Names as constituting the Firm of Eng Chuan and Company from December 31, 1953 until it ceased trading in 1971. In their Lordships' view, if the Bank sought to rely upon the monthly tenancy being vested in someone other than the personal appellants as tenant under that description, the onus lay upon the Bank to prove it."

We accordingly endorse the learned Judge's conclusion on the issue presented and dismiss this appeal with costs. The deposit lodged in court will be paid out to the respondent to account of costs.

Appeal dismissed.

Solicitors: *Presgrave & Mathews; Tan Beng Hong & Co.*

NATIONAL INSURANCE CO. LTD. v. ABDUL HAFIDZ BIN HAJI ABDUL RAHMAN & ANOR.

[F.C. (Salleh Abas C.J. (Malaya), Wan Suleiman & Seah F.JJ.) March 8 & April 14, 1983]

[Johore Bahru – Federal Court Civil Appeal No. 170 of 1981]

Insurance – Plaintiffs injured in road traffic accident by car – Judgment obtained against driver of car – Motor car insured with second defendants by owner – Driver driving with permission of owner – Driver also covered by insurance with first defendants (appellants) in respect of his own car – Policy indemnifying him while driving motor car not belonging to him – Whether first or second defendants liable to satisfy judgment – Road Traffic Ordinance, S. 80.

Road Traffic – Insurance policy – Which insurer to be liable.

In this case the plaintiffs (respondents) were injured in a road traffic accident by a motor car driven by one Ko Beng Lai. They sued the driver and obtained judgment against him. The car belonged to one Kwang Shi Ching who insured it with the second defendants. The policy covered user of car by an authorised driver and in this case the driver drove with the permission of the owner. The driver was himself covered by an insurance in respect of his own motor car, the policy being issued by the first defendants – appellants. The judgment not having been paid the plaintiffs sued the first and second defendants. At the trial it was agreed that the issues to be decided were –

(a) whether the policy of the first defendants or the second defendants were at risk at the material time of the accident;

(b) whichever defendants found to be liable could they call for rateable contribution from the other defendants.

The learned trial judge held that the first defendants were liable to satisfy the judgment as their policy was the

one which was on risk. The second defendants – appellants appealed.

Held: (1) the injuries suffered by the plaintiffs arose out of the use of the motorcar which was insured with the second defendants and therefore it is their policy which was on risk. As the judgment to be satisfied is one in respect of the liability which arose from the use of the car, it is the second defendants who must be the insurer within the meaning of section 80(1) of the Road Traffic Ordinance;

(2) the proviso to the policy issued by the second defendants in respect of an authorised driver to the effect that the second defendants would not be liable to indemnify such a driver if he is entitled to an indemnity under any other policy, has to be ignored for the purpose of section 80. The proviso is a contractual matter between the second defendants and their insured whilst the liability to satisfy the judgment is statutory and therefore must prevail over any contractual stipulations;

(3) the plaintiffs' right to the satisfaction of their judgment is not affected by any of the provisions of section 80.

Cases referred to:

(1) *Tattersall* v. *Drysdale* [1935] 2 K.B. 174, 175.
(2) *Austin* v. *Zurich General Accident and Liability Insurance Co. Ltd.* [1945] 1 K.B. 250.

FEDERAL COURT.

P. Devadas for the appellants.
Dato K.C. Koh for 1st & 2nd respondents.
B.T. Lee for the 2nd defendants.

Cur. Adv. Vult.

Salleh Abas C.J. (Malaya) (delivering the Judgment of the Court): The plaintiffs were injured in a road traffic accident by a motorcar JF 5143 driven by one Ko Beng Lai. They sued Ko and subsequently obtained an interlocutory judgment against him which was later assessed at $44,098.00. Ko did not pay the judgment sum and, after obtaining no response from the defendants who were insurers in respect of the use of the aforesaid motorcar by Ko, the plaintiffs availing themselves of section 80 of the Road Traffic Ordinance, 1958 (F.M. 49 of 1958), (the Ordinance), sued both of them. Although both the defendants agreed that the plaintiffs were entitled to have their judgment satisfied under section 80, each is denying liability and claiming the other to be liable therefor.

Motorcar JF 5143 which was driven by Ko and caused injuries to the plaintiffs was not owned by Ko, but by one Kwang Shi Ching who insured it with the second defendants. Under this policy the second defendants undertook to indemnify the insured (Kwang Shi Ching) in the event of accident caused by or arising out of the use of this car against all sums which he (the insured) shall become legally liable to pay in respect of death or bodily injuries caused to any person. The policy also contained the usual extension clause relating to an authorized driver in that the second defendants undertook to indemnify any authorized driver who was driving the car provided that he was not entitled to indemnify under any other policy. (See *Section II, clause 2(a)(ii) of the second defendants' policy at page 53 of the Record).* In the context of this policy Ko, not being the owner of motorcar JF 5143, was at the most an authorized driver; the term "authorized driver" not being defined by the policy, to mean any person driving the insured vehicle with the permission of the insured or the policy holder.

However, Ko was also covered by a policy issued by the first defendants in respect of his own motorcar, which was registered as JE 8143. Under this policy the first defendants in addition to undertaking to indemnify Ko in respect of the use of his own motorcar by himself or by an authorized driver also undertook to indemnify him whilst personally driving a private motorcar not belonging to him. (See *Section II, clause 2(b) of the first defendants' policy at page 55 of the Record).* Thus becuase Ko was covered by the first defendants' policy in respect of his own motorcar with an extension of cover in respect of any other motorcar, the second defendants averred in their statement of defence that their policy did not cover Ko and that they were therefore not liable under section 80 of the Road Traffic Ordinance to satisfy the plaintiffs' judgment. They also contended that the failure of the plaintiffs to give them a notice of the commencement of the proceedings against Ko as required under subsection (2) (a) of section 80 of the Ordinance absolved them from the obligation to satisfy the judgment and that the first defendants, being the insurer of Ko, must be the one who should satisfy the judgment.

The first defendants on the other hand averred in their statement of defence that they were under no obligation to satisfy the adjudged sum because (i) Ko did not notify them of the occurence of the accident as required by condition 4 of the policy and liability thereunder was thereby repudiated; and (ii) because their liability for Ko is not a liability in respect of which the plaintiffs'

judgment was obtained as it is not such a liability as is required to be covered by a policy under section 75(1)(b) of the Ordinance.

At the trial before the learned trial judge the plaintiffs and both the defendants agreed on a statement of facts and invited the learned judge to give his decision on the basis of these facts. He accordingly held that the first defendants were liable to satisfy the judgment as their policy was the one which was on risk. Hence this appeal.

In this appeal counsel for the first defendants strenuously argued that it was the policy of the second defendants which was on risk, and not his client's and as such the second defendants were "the insurer" who must comply with section 80 of the Ordinance.

An insurance policy is essentially a contract of indemnity between the insured (policy holder) and his insurer. In the absence of any statutory provisions, no person who is not a party to the contract, though entitled to the benefits under it can obtain such benefits directly from the insurer. In England the first inroad into this common law principle of privity of contract was made by the Third Parties (Rights against Insurers) Act, 1930. Under section 1 of the Act in certain circumstances the insured's right against his insurer was transferred to the third party, to whom the liability insured under the policy was incurred. It was against this background that the Road Traffic Act 1930 replaced by a series of Acts until the present Road Traffic Act 1972 was passed. The provisions relating to compulsory insurance against third party risk contained in our Road Traffic Ordinance are modelled on the corresponding provisions in the English Road Traffic Acts. Section 80 of our Ordinance which forms the basis of the plaintiffs' suit in this case is *in pari materia* with section 149 of the English 1972 Act, which itself is a re-enactment of section 207 of the 1960 Act and section 10 of the 1934 Act.

This case is purely a matter of construction of section 80(1) of our Road Traffic Ordinance, which is as follows:

"80.(1) If, after a certificate of insurance has been delivered under subsection (4) of section 75 of this Ordinance to the person by whom a policy has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of subsection (1) of section 75 of this Ordinance (being a liability covered by the terms of the policy) is given against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any written law relating to interest on judgments."

Without this provision the plaintiffs can have no direct right of action against the defendants in respect of the bodily injuries caused to them arising out of the use of the motorcar JF 5143. By virtue of this provision the plaintiffs have a compulsorily insurable claim. But against whom? In view of the double insurance and the disclaimer by each of the defendants, the issue which the court must determine is this: Who, in the circumstances of this case, is the "insurer" within the meaning of that provision to satisfy the compulsorily insurable claim?

Section 80(1) of the Ordinance with its complex sentence is by no means an easy section to construe. But it is clear from it that the insurer liable to satisfy the judgment under the section must be the one who –

(1) has delivered a certificate of insurance under subsection (4) of section 75;

(2) has undertaken to indemnify his insured against such liability as is required to be covered under paragraph (b) of subsection (1) of section 75 (being a liability covered by the terms of the policy); and

(3) the judgment it has to satisfy is one which is given against any person insured by the policy.

The agreed statement of facts is silent on the question of delivery of certificates of insurance. Since this is not an issue to this case, we assume that each of the defendants has delivered their certificate of insurance to their respective insured, thus rendering both the policies effective for the purpose of the Ordinance. However, up to this point we cannot just yet determine which of the two defendants is the "insurer" within the meaning of section 80(1) of the Ordinance.

We must now consider condition (2) above. The liability to be covered under section 75(1)(b) of the Ordinance is, to quote the words of the section –

"any liability which may be incurred by him or them (i.e. person or persons or classes of persons specified in the policy) in respect of the death of or bodily injury to

any person *caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road.*" (the bracketed words and emphasis are ours).

The injuries suffered by the plaintiffs were not caused by Ko's own motorcar JE 8143 but by motorcar JF 5143. It is arising out of the use of the latter motorcar that the injuries to the plaintiffs were caused. As this car was insured with the second defendants, it is their policy which was on risk and likewise as the judgment to be satisfied is one in respect of liability which arose out of the use of the said motorcar JF 5143, it is the second defendants who must be "the insurer" within the meaning of section 80(1) of the Ordinance. This fact excludes the applicability of the first defendants as "the insurer". Even if we look at the policies, the system adopted by any insurance company with respect to motorcar insurance is that the company insures a particular car protecting its owner and its authorized driver in case of injuries to a third party; the premium being calculated partly on value and partly on engine capacity. The decisive factor which is the subject matter of the insurance is the specified motorcar. It is because of the use of the motorcar that an insurance is required. (Section 74 of the Ordinance and see *Tattersall* v. *Drysdale*.[1])

The expression "any person insured" used in section 80(1) of the Ordinance has a wider meaning than the words "the insured" used in the policies. "The insured" refers only to the policy holder, whilst "any person insured" does not only refer to the policy holder, or the insured but also extends to any authorized driver. The question whether Ko was an authorized driver and therefore insured by the second defendants' policy was never pleaded, nor was it in issue in the court below. Even before us it was only raised in passing. What the second defendants contended in the court below was that their policy was not on risk because Ko was covered by the first defendants' policy and as such they were not liable under section 80 of the Ordinance to satisfy the judgment. It was at the prompting of their counsel's submission that the learned trial judge in fact defined in his judgment the issues which he was called upon to decide. These are whether –

"(a) the policy of the first or the second defendants was on risk at the material time of the accident; and

(b) whichever defendants found to be liable could they call for rateable contribution from the other defendants."

(See page 45 of the Appeal Record)

Thus it is clear from the agreed statement of facts and the parties' submissions on these facts and their pleadings that their understanding was that Ko was an authorized driver. That being the case, Ko must be "a person insured by the" second defendants' policy, and as such the second defendants must be "the insurer" within the meaning of section 80 of the Ordinance to satisfy the plaintiffs' judgment.

The policy issued by the second defendants in respect of an authorized driver is qualified by a proviso to the effect that the second defendants would not be liable to indemnify such a driver if he is entitled to an indemnity under any other policy. Can they now rely upon this proviso? What effect has the proviso upon the construction of section 80(1) of the Ordinance? In other words, is Ko still "a person insured" by the second defendants' policy within the meaning of that section, despite the fact that according to the policy the second defendants would not indemnify him because of his cover by the first defendants? In our view for the purpose of section 80, this proviso has to be ignored. The proviso and indeed the whole clause relating to an authorized driver is a contractual matter between the second defendants and their insured, the owner of motorcar JF 5143, whilst the liability to satisfy the judgment is statutory and therefore must prevail over any contractual stipulations. The matter is made clear by section 80(1) itself which provides that the insurer shall pay the person entitled to the benefit of the judgment "notwithstanding that the insurer may be entitled to avoid or cancel or may have avoided or cancelled the policy".

A great deal of confusion seems to creep into the case because of the failure to appreciate the difference between the statutory obligation of an insurer under section 80(1) to satisfy a judgment given against a person insured by its policy on the one hand and the insurer's contractual obligation to indemnify its insured and/or his authorized driver on the other. If Ko had paid the plaintiffs and thereafter sued the second defendants under section 75(3) of the Ordinance for an indemnify of the sum he had so paid the proviso may well be a relevant issue. (See *Austin* v. *Zurich General Accident and Liability Insurance Co. Ltd.*[2]) Almost every authority cited to us in this appeal deals with the question of contributions and indemnity between insurers and their insured and authorized drivers. None is on the question of liability to satisfy a judgment obtained by a

third party. Similarly, if the second defendants having paid the plaintiffs were to sue Ko for the recovery of the sum so paid or sue the first defendants for a rateable contribution of the said sum, the proviso is equally important. And if it is held that Ko was not covered by the second defendants' policy, he is entitled to turn to the first defendants, who under their policy covered him whilst even driving a motorcar belonging to another person. But all these issues are issues which are relevant only as between the insurers and the insured and authorized drivers. They are not relevant in a suit between the injured third parties and the insurers. In such a suit the expression in section 80(1) of the Ordinance saying "notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy" renders such issues irrelevant.

The plaintiffs' right to the satisfaction of the judgment by the second defendant is not absolute as it is expressly stated in section 80(1) of the Ordinance to be "subject to the provisions of this section". One of the provisions relied upon by the second defendants in their statement of defence is subsection (2)(a). Under this subsection the second defendants would not be liable to pay the judgment sum "unless before or within seven days after the commencement of the proceedings in which the judgment was given *the insurer (i.e. second defendants) had notice of the proceedings.*" (The bracketed words and emphasis are ours). The second defendants said in the statement of defence that they were under no statutory duty to satisfy the said judgment, "as the plaintffs had failed to give to the second defendants notice of commencement of proceedings in Civil Suit No. 82 of 1975 as required under section 80(2)(a) of the Road Traffic Ordinance, 1958 (No. 49 of 1958)". But this defence was abandoned by them at the trial. (See page 19 of the Appeal Record). The parties simply agreed between themselves to submit for the court's ruling certain agreed issues without calling evidence. At the risk of repetition counsel for the second defendants defined the issues to be as follows:

"The issues to be decided by this Honourable Court are as follows:

(a) whether the policy of the first defendants or the second defendants were on risk at the material time of the accident;

"(b) whichever defendants are found to be liable to satisfy the judgment sum and costs, could they call for contribution from the other for 50 percent in view of the Condtion 7 of the policy of insurance."

Thus we cannot see how the second defendants should be allowed to raise this question again after having abandoned it.

In conclusion, we hold that the plaintiffs' right to the satisfaction of their judgment is not affected by any of the provisions of section 80 of the Ordinance. We therefore allow the appeal which means that the second defendants must satisfy the plaintiffs' judgment. As to the question of costs, the second defendants must bear the costs of the plaintiffs and the first defendants in the court below and here. The deposit should be refunded to the first defendants, who have won this appeal.

Appeal allowed.

Solicitors: *Devadas & Co.; K.C. Koh & Co.; Leong Wai Yin & Co.*

TAN KIAW v. GAN CHYE KHOON

[F.C. (Salleh Abas C.J., Wan Suleiman & George Seah F.JJ.) March 5 & April 21, 1983]

[Johor Bahru – Federal Court Civil Appeal No. 48 of 1982]

Landlord and tenant – Tenancy of premises in the name of partners of business – Expiry of tenancy agreement – Notice to quit given to the original partners – One of partners retired from firm – Partnership carried on by remaining partner and new partner – Judgment for possession given against tenants – Application for writ of possession – Claim by occupant of premises – Subordinate Court Rules, 1980, Order 8, rule 10, Order 30 and 31 – National Land Code, s. 225.

Partnership – Tenancy of premises in name of partners – Expiry of tenancy agreement – Notice to Quit to original partners – Retirement of one of partners.

In this case the appellant on March 12, 1977 entered into a tenancy agreement of premises belonging to her with two named persons, Taplil bin Ithnain and Lim Ah Lek, who carried on a rubber dealers business in partnership under the style of Hwa Mah Trading Company. The respondent subsequently joined the partnership. Lim Ah Lek withdraw from the firm on December 15, 1977 and the business was carried on in the name of the respondent and Taplil bin Ithnain. The tenancy agreement expired on February 28, 1980 and notice to quit was given by the appellant to Taplil bin Ithnain and Lim Ah Lek. Subsequently the appellant brought an action in the